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In the Matter of

**Distribution of 1995, 1996, 1997
and 1998 Digital Audio Recording Funds**

Docket No. 99-3 CARP DD 95-98

ORDER

On November 15, 1999, the Copyright Office received a Motion for Partial Distribution, Motion for Full Distribution and Motion to Decide the Controversy on the Basis of Written Pleadings from Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, the Harry Fox Agency, Inc., The Songwriters Guild of America, and Copyright Management, Inc. (collectively, the "Settling Parties"). Specifically, the Settling Parties request: 1) a ninety-five percent partial distribution of the royalty fees allocated to the 1995 and 1997 Musical Works Fund, Writers and Publishers Subfunds, and 1998 Musical Works Fund, Writers Subfund, and 2) a full distribution of the royalty fees allocated to the 1996 Musical Works Fund, Writers and Publishers Subfunds, and the 1998 Musical Works Fund, Publishers Subfund only. In addition, the Settling Parties ask the Librarian to certify their Motion to Decide the Controversy on the Basis of the Written Pleadings to the CARP for its consideration; or in the alternative, they request that the Librarian "exercise his authority and grant this Motion so that the copyright royalty funds are not further depleted by the cost of an unnecessary trial."

Mr. Eugene "Lampchops" Curry ("Curry"), one of two claimants who has not reached a settlement agreement with the Settling Parties, filed a response to the Motion for Partial Distribution on November 23, 1999. Although Mr. Curry does not state any reasons for opposing the Settling Parties' request for a distribution of the DART funds, he intimates that there is no reason for making a distribution to the Settling Parties at this stage of the proceeding merely because they asked for the funds.

Ms. Alicia Carolyn Evelyn ("Evelyn"), the second participant to this proceeding with an outstanding claim, also filed a response to the November 15 motion. Her response is part of a document stylized as a "Rebuttal of the Direct Case of the Settling Parties in the Above-Referenced Distribution Proceeding" and filed with the Office on November 24, 1999. The extent of Ms. Evelyn's response to the November 15 motion was a single sentence, stating that she opposes a partial distribution of the monies not in controversy. See Order, Docket No. 99-3 CARP DD 95-98, dated November 24, 1999.

Background

On May 4, 1999, the Copyright Office published a notice in the Federal Register, announcing the consolidation of the proceeding to determine the distribution of the royalty fees collected in 1995, 1996, 1997 and 1998 for the distribution of digital audio recording media and devices allocated to the Musical Works Fund for these years. In addition, the Office asked all claimants to these funds to file comments with the Office on the extent of controversy that remained and, in the case where the claimant expected to participate in a CARP proceeding in order to settle the controversies, to submit a notice of intent to participate. 64 FR 23875 (May 4, 1999).

Notices of intent to participate in the distribution proceeding were filed by each of the Settling Parties and four individual claimants: Carl DeMonbrun (and Polyphonic Music, Inc., collectively referred to herein as "DeMonbrun"); James Cannings (and Can Can Music, collectively referred to herein as "Cannings"); Alicia Carolyn Evelyn; and Eugene "Lambchops" Curry, collectively referred to herein as "Curry"). Since filing the notices of intent, DeMonbrun and Cannings have reached an agreement with the Settling Parties and have withdrawn their respective claims. See Notices of Settlement, filed November 12, 1999 and November 16, 1999. These settlements resolved the controversies relating to the 1996 Musical Works Fund and the 1998 Musical Work Fund, Publishers Subfund, and are the basis for the Motion for a Full Distribution.

Controversies between the Settling Parties and Curry and Evelyn relating to the distribution of the 1995 and 1997 Musical Works Fund, Writers and Publishers Subfunds, and the 1998 Musical Works Fund, Writers Subfund, remain. These parties will present their cases to a CARP for the purpose of determining the distribution of the royalty fees in these funds. In preparation for that proceeding, the Copyright Office issued a scheduling order on September 21, 1999, setting the dates for the 45-day precontroversy discovery period and the initiation of the CARP.

Discussion

a. Motions for distribution

Section 1007(b) of the Copyright Act, title 17 of the United States Code, provides the authority for the Librarian of Congress to make a distribution of royalty fees in the absence of a dispute. It states that:

[T]he Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.

17 U.S.C. 1007(b). Similar language in section 1007(c) provides separate authority for a partial distribution of any amounts that are not in controversy.

The Settling Parties have filed with the Copyright Office separate notices of settlement relating to Cannings and DeMonbrun. Each notice includes a statement from the Settling Parties attesting that a settlement agreement has been executed between each of these claimants and the Settling Parties, and a letter from the individual claimant confirming the agreement and withdrawing all claims asserted to any portion of the 1995, 1996, 1997 or 1998 Musical Works Fund.

In light of these submissions, the Office has determined that no controversies remain in either the 1996 Musical Works Fund, Writers and Publishers Subfunds, or the 1998 Musical Works Fund, Publishers Subfund. Therefore, in accordance with section 1007(b), the Register is ordering a full distribution of these funds to the Settling Parties on or after January 20, 2000.

However, controversy still exists with respect to the distribution of the 1995 and 1997 Musical Works Fund, Writers and Publishers Subfunds, and the 1998 Musical Work Fund, Writers Subfund. For that reason, the Settling Parties seek only a partial distribution of ninety-five percent of the available royalties in the aforementioned funds. The Settling Parties argue that the remaining five percent will be more than adequate to meet its obligation to withhold sufficient funds to resolve the controversies and pay the cost of an arbitration proceeding. In support of their request, the Settling Parties cite the statutory authority granted to the Librarian of Congress in section 1007(c) which allows for a distribution during the pendency of a proceeding of any amounts not in controversy, provided that sufficient funds are retained to cover the reasonable administrative costs of the Library.

Both Curry and Evelyn oppose the Settling Parties' request for a partial distribution, but neither claimant articulates a rationale for denying the motion. To oppose a motion, an opposition must state specific reasons why the Office cannot or should not grant the motion; otherwise, as in this case, it is without effect.

Therefore, the only task for the Copyright Office is to determine the extent of the partial distribution. The Settling Parties assert that the value of Curry's and Evelyn's claims will not exceed "more than 0.01% of the total amount available for distribution in any one year at issue in this proceeding." Settling Parties' Motion at 5. This assessment is in line with the values that Curry and Evelyn assign to their own claims. Curry has stated that the settling parties are entitled to 99.998% of the 1995 and 1997 Musical Works Funds, and Evelyn has assessed the value of her claims at \$96. See Direct Cases of Curry and Evelyn. Clearly, these amounts are far below the amount (0.01% of the funds) identified by the Settling Parties as sufficient for satisfying the outstanding claims.

The more difficult aspect of the determination is the assessment of the administrative costs of the Library associated with this proceeding. The Settling Parties cite the costs of the one and only DART distribution proceeding and reason that the cost of the current proceeding will mirror these past costs.

The Register, however, cannot adopt the Settling Parties' method for assessing the total cost of this proceeding. First, there has been no determination that this proceeding will be decided on the basis of the written pleadings. Until such determination has been made, the Office must retain adequate funds to conduct a proceeding which would include oral testimony. The Office also notes that the cost of a more recent CARP proceeding exceeded \$27,000, even though the parties reached a settlement prior to the first day of hearings. This factor alone supports a finding that the request for retention of only five percent of the funds is insufficient. In addition to the current proceeding, the Office must consider the possibility of an appeal of the Librarian's final order and prepare accordingly. See, Order, Docket No. 95-1 CARP DD 92-94 (February 10, 1997).

For these reasons, the Office has decided to retain \$100,000 from the 1995 Musical Works Fund, \$125,000 from the 1997 Musical Works Fund, and \$75,000 from the 1998 Musical Works Fund. The funds from the 1995 and 1997 Musical Works Funds will be drawn equally from each of the Writers and Publishers Subfunds because controversies exist in both. The funds from the 1998 Musical Works Fund shall be drawn only from the Writers Subfund because the remaining controversy for that year is over the distribution of that subfund.

b. Motion to decide the controversy on the basis of the written pleadings

The Settling Parties have asked that its motion to decide the controversy on the basis of the written pleadings be certified to the CARP for its consideration, or for the Librarian to decide the issue on his own authority. No oppositions were filed to this motion.

The Librarian has authority to dispense with formal hearings when all parties consent to the change or if the controversy does not involve any genuine issue of material fact. 37 CFR 251.41(b). However, the Settling Parties do not argue that there are no genuine issues of material fact to be decided; nor have all parties consented to allow the determination to be made on the basis of the written pleadings alone. Consequently, the Librarian has no authority to grant the Settling Parties' request to decide the matter directly.

But under the authority of section 801(c) of the Copyright Act, the Librarian may make procedural and evidentiary rulings in CARP proceedings, including the designation of issues to the CARP for its consideration. On two past occasions, the Librarian has designated the very issue presented by the Settling Parties. Order, Docket No. 95-1 CARP DD 92-94 (July 25, 1996) and Order, Docket No. 94-3 CARP CD 90-92 (August 19, 1997).


Wherefore, **IT IS ORDERED** that the following issue is designated to the CARP for its consideration: whether to suspend formal hearings and proceed to decide the remaining controversies concerning the distribution of the 1995, 1997, and 1998 Musical Works Funds on the basis of the written pleadings.

Wherefore, **IT IS FURTHER ORDERED** that the motion for a full distribution of the available 1996 Musical Works Fund, Writers and Publishers Subfunds, and the 1998 Musical Works Fund, Publisher Subfund only, is **GRANTED**.

Wherefore, **IT IS FURTHER ORDERED** that the motion for a partial distribution of the available 1995 and 1997 Musical Works Funds, Writers and Publishers Subfunds, and the 1998 Musical Works Fund, Writers Subfund only, is **GRANTED IN PART AND DENIED IN PART**. The Office grants the distribution of the available funds identified in this paragraph, less a withholding of \$100,000 from the 1995 Musical Works Fund, \$125,000 from the 1997 Musical Works Fund, and \$75,000 from the 1998 Musical Works Fund. For the 1995 and 1997 Musical Works Funds, an equal amount of the monies withheld shall come from each of the subfunds. For the 1998 Musical Works Fund, the entire \$75,000 shall be withheld from the Writers Subfund.

The Copyright Office shall make the distribution on or after January 20, 2000, **provided that** each of the Settling Parties provides a signed agreement prepared by the Copyright Office no later than January 13, 2000, stating that any overpayment that results from the distribution of these funds shall be repaid to the Copyright Office with interest according to the amount that would have accrued if the principal had remained in the fund. In addition, the Settling Parties must provide all pertinent information to effect the transfer of the funds to the Licensing Division of the Copyright Office no later than January 13, 2000.

SO ORDERED.


Marybeth Peters,
Register of Copyrights.

DATED: December 22, 1999